

RULE 3.111. PROVIDING COUNSEL TO INDIGENTS

(a) **When Counsel Provided.** A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing magistrate, whichever occurs earliest.

(b) **Cases Applicable.**

(1) Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by imprisonment ~~(or by incarceration in a juvenile corrections institution)~~ incarceration including appeals from the conviction thereof. In the discretion of the court, counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor or violation of a municipal ordinance if the judge, before trial, at least 15 days prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned if convicted a written order of no incarceration certifying that the defendant will not be incarcerated in the case pending trial or probation violation hearing, or as part of a sentence after trial, guilty or nolo contendere plea, or probation revocation. This 15 day requirement may be waived by the defendant or defense counsel.

(A) If the court issues an order of no incarceration after the public defender has been appointed to represent the defendant, the court may discharge the public defender unless the defendant is incarcerated or the defendant would be substantially disadvantaged by the discharge of the public defender.

(B) If the court determines that the defendant would be substantially disadvantaged by the discharge of the public defender, the court shall either:

- i. not discharge the public defender; or
- ii. discharge the public defender and allow the defendant a reasonable time to obtain private counsel, or if the defendant elects to represent himself or herself, a reasonable time to prepare for trial.

(C) If the court withdraws its order of no incarceration, it shall immediately appoint the public defender if the defendant is otherwise eligible for the services of the public defender. The court may not withdraw its order of no

incarceration once the defendant has been found guilty or pled nolo contendere.

(2) Counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including postconviction proceedings and appeals therefrom, extradition proceedings, mental competency proceedings, and other proceedings that are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal.

(3) Counsel may be provided to a partially indigent person on request, provided that the person shall defray that portion of the cost of representation and the reasonable costs of investigation as he or she is able without substantial hardship to the person or the person's family, as directed by the court.

(4) "Indigent" shall mean a person who is unable to pay for the services of an attorney, including costs of investigation, without substantial hardship to the person or the person's family; "partially indigent" shall mean a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person's family.

(5) Before appointing a public defender, the court shall:

(A) inform the accused that, if the public defender is appointed, a lien for the services rendered by the public defender may be imposed under section 27.56, Florida Statutes;

(B) make inquiry into the financial status of the accused in a manner not inconsistent with the guidelines established by section 27.52, Florida Statutes. The accused shall respond to the inquiry under oath;

(C) require the accused to execute an affidavit of insolvency in the format provided by section 27.52, Florida Statutes.

(c) **Duty of Booking Officer.** In addition to any other duty, the officer who commits a defendant to custody has the following duties:

(1) The officer shall immediately advise the defendant:

(A) of the right to counsel;

(B) that, if the defendant is unable to pay a lawyer, one will be provided immediately at no charge.

(2) If the defendant requests counsel or advises the officer that he or she cannot afford counsel, the officer shall immediately and effectively place the defendant in communication with the (office of) public defender of the circuit in which the arrest was made.

(3) If the defendant indicates that he or she has an attorney or is able to retain an attorney, the officer shall immediately and effectively place the defendant in communication with the attorney or the Lawyer Referral Service of the local bar association.

(4) The public defender of each judicial circuit may interview a defendant when contacted by, or on behalf of, a defendant who is, or claims to be, indigent as defined by law.

(A) If the defendant is in custody and reasonably appears to be indigent, the public defender shall tender such advice as is indicated by the facts of the case, seek the setting of a reasonable bail, and otherwise represent the defendant pending a formal judicial determination of indigency.

(B) If the defendant is at liberty on bail or otherwise not in custody, the public defender shall elicit from the defendant only the information that may be reasonably relevant to the question of indigency and shall immediately seek a formal judicial determination of indigency. If the court finds the defendant indigent, it shall immediately appoint counsel to represent the defendant.

(d) **Waiver of Counsel.**

(1) The failure of a defendant to request appointment of counsel or the announced intention of a defendant to plead guilty shall not, in itself, constitute a waiver of counsel at any stage of the proceedings.

(2) A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's

comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.

(3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel.

(4) A waiver of counsel made in court shall be of record; a waiver made out of court shall be in writing with not less than 2 attesting witnesses. The witnesses shall attest the voluntary execution thereof.

(5) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed by the court at each subsequent stage of the proceedings at which the defendant appears without counsel.

(e) **Withdrawal of Defense Counsel After Judgment and Sentence.** The attorney of record for a defendant in a criminal proceeding shall not be relieved of any duties, nor be permitted to withdraw as counsel of record, except with approval of the lower tribunal on good cause shown on written motion, until after:

(1) the filing of:

(A) a notice of appeal;

(B) a statement of judicial acts to be reviewed, if a transcript will require the expenditure of public funds;

(C) directions to the clerk, if necessary; and

(D) a designation of that portion of the reporter's transcript that supports the statement of judicial acts to be reviewed, if a transcript will require expenditure of public funds; or

(2) substitute counsel has been obtained or appointed, or a statement has been filed with the appellate court that the appellant has exercised the right to self-representation. In publicly funded cases, the public defender for the

local circuit court shall be appointed initially until the record is transmitted to the appellate court; or

(3) the time has expired for filing of a notice of appeal, and no notice has been filed.

Orders allowing withdrawal of counsel are conditional, and counsel shall remain of record for the limited purpose of representing the defendant in the lower tribunal regarding any sentencing error that the lower tribunal is authorized to address during the pendency of the direct appeal under rule 3.800(b)(2).

Committee Notes

1972 Adoption. Part 1 of the ABA Standard relating to providing defense services deals with the general philosophy for providing criminal defense services and while the committee felt that the philosophy should apply to the Florida Rules of Criminal Procedure, the standards were not in such form to be the subject of that particular rule. Since the standards deal with the national situation, contained in them were alternative methods of providing defense services, i.e., assigned counsel vs. defender system; but, Florida, already having a defender system, need not be concerned with the assigned counsel system.

(a) Taken from the first sentence of ABA Standard 5.1. There was considerable discussion within the committee concerning the time within which counsel should be appointed and who should notify defendant's counsel. The commentary in the ABA Standard under 5.1a, b, convinced the committee to adopt the language here contained.

(b) Standard 4.1 provides that counsel should be provided in all criminal cases punishable by loss of liberty, except those types where such punishment is not likely to be imposed. The committee determined that the philosophy of such standard should be recommended to the Florida Supreme Court. The committee determined that possible deprivation of liberty for any period makes a case serious enough that the accused should have the right to counsel.

(c) Based on the recommendation of ABA Standard 5.1b and the commentary thereunder which provides that implementation of a rule for providing the defendant with counsel should not be limited to providing a means for the accused to contact a lawyer.

(d) From standard 7.2 and the commentaries thereunder.

1980 Amendment. Modification of the existing rule (the addition of (b)(5)(A)–(C)) provides a greater degree of uniformity in appointing counsel to indigent defendants. The defendant is put on notice of the lien for public defender services and must give financial information under oath.

A survey of Florida judicial circuits by the Committee on Representation of Indigents of the Criminal Law Section (1978–79) disclosed the fact that several circuits had no procedure for determining indigency and that there were circuits in which no affidavits of insolvency were executed (and no legal basis for establishing or collecting lien monies).

1992 Amendment. In light of *State v. District Court of Appeal of Florida, First District*, 569 So.2d 439 (Fla. 1990), in which the supreme court pronounced that motions seeking belated direct appeal based on ineffective assistance of counsel should be filed in the trial court pursuant to rule 3.850, the committee recommends that rule 3.111(e) be amended to detail with specificity defense counsel’s duties to perfect an appeal prior to withdrawing after judgment and sentence. The present provision merely notes that such withdrawal is governed by Florida Rule of Appellate Procedure 9.140(b)(3).

1998 Amendment. The amendments to (d)(2)–(3) were adopted to reflect *State v. Bowen*, 698 So.2d 248 (Fla. 1997), which implicitly overruled *Cappetta v. State*, 204 So.2d 913 (Fla. 4th DCA 1967), *rev’d on other grounds* 216 So.2d 749 (Fla. 1968). See *Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir. 1986), for a list of factors the court may consider. See also *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), and *Savage v. Estelle*, 924 F.2d 1459 (9th Cir. 1990), *cert. denied* 501 U.S. 1255, 111 S.Ct. 2900, 115 L.Ed.2d 1064 (1992), which suggest that the defendant’s right to self-representation is limited when the defendant is not able or willing to abide by the rules of procedure and courtroom protocol.

2000 Amendment. This rule applies only to judicial proceedings and is inapplicable to investigative proceedings and matters. See rule 3.010.

2002 Amendment. Indigent defendants are entitled to counsel if they are either currently in custody or might be incarcerated in their case. See *Alabama v.*

Shelton, 122 S.Ct. 1764, 1767 (2002) (Sixth Amendment forbids imposition of suspended sentence that may “end up in the actual deprivation of a person’s liberty” unless defendant accorded “the guiding hand of counsel”). See also *Tur v. State*, 797 So. 2d 4 (Fla. 3d DCA 2001) (uncounseled plea to criminal charge cannot result in jail sentence based on violation of probationary sentence for that charge); *Harris v. State*, 773 So. 2d 627 (Fla. 4th DCA 2000).

Discharge of the public defender based on an order certifying no incarceration that is entered after the public defender has already spent considerable time and resources investigating the case and preparing a defense may leave the defendant “in a position worse than if no counsel had been appointed in the first place.” *State v. Ull*, 642 So. 2d 721, 724 (Fla. 1994).

In determining whether a defendant’s due process rights would be violated by the discharge of the public defender, the court should consider all of the relevant circumstances, including, but not limited to:

1. The stage of the proceedings at which the order of no incarceration is entered.
2. The extent of any investigation and pretrial preparation by the public defender.
3. Any prejudice that might result if the public defender is discharged.
4. The nature of the case and the complexity of the issues.
5. The relationship between the defendant and the public defender.

Counsel may be provided to indigent persons in all other proceedings in, or arising from, a criminal case and the court should resolve any doubts in favor of the appointment of counsel for the defendant. See *Graham v. State*, 372 So. 2d 1363, 1365 (Fla. 1979).

See form found at *Fla.R.Crim.P.* 3.994.

RULE 3.994. ORDER CERTIFYING NO INCARCERATION.

_____ In theCourt of the
_____ Judicial Circuit,
_____ in and for
_____ County, Florida
_____ Case No.:
_____ Division:

State of Florida,)
 Plaintiff,)
v.)
.....(name).....)
 Defendant.)
)

ORDER CERTIFYING NO INCARCERATION

1. The court hereby certifies that it will not impose any period of incarceration upon the defendant if there is a finding of guilt, a plea of guilty or nolo contendere on the substantive charge(s), or any probation revocation in this case.

2. The court hereby finds that the defendant is not incarcerated in this case.

3. Accordingly,

- The court declines to appoint a public defender in this case.
- The court having found that the defendant will not be substantially prejudiced by the discharge of the public defender, the public defender is discharged in this case.
- The court finds that the defendant would be substantially prejudiced by the discharge of the public defender and, therefore, the Court will not discharge the public defender in this case.

4. This certification of no incarceration may be withdrawn by the court after notice to the defendant unless the court has made a finding of guilt or the defendant has pled guilty or nolo contendere.

5. If this order certifying no incarceration is withdrawn after the public defender has been discharged pursuant to this order, there shall be an immediate redetermination of indigency and appointment of counsel.

DONE AND ORDERED at, Florida, on(date).....

Judge _____